

**Commissioner Josiah L. Neeper, Dissenting:**

I dissent from the majority's decision. The majority's decision errs in its analysis of Internet traffic by segmenting one leg of Internet call and considering it a local call while deeming the remaining segment of the call information service. Internet call does not terminate at the local switch of the Internet Service Provider; nor does it terminate at the competitive local exchange carrier's (CLECs) switch. Rather, it terminates at the ultimate destination the caller targets, similar to long distance service, and can be local, intrastate, interstate or international.

There is one overriding question in this case. That is: where does Internet traffic terminate? Does it terminate at the competitive local exchange carrier's switch or the modem of an Internet Service Provider? Or does it terminate at its ultimate destination the caller wishes to access?

The Coalition's Motion raises two intertwined and inseparable issues. We are to determine, first, whether Internet traffic is interstate or intrastate. That starts with the federal-state jurisdictional question, but the answer to this question inescapably leads to deciding the subsequent question: whether Internet traffic starts with a separate, severable, telephone segment that is subject to reciprocal compensation. If we say the Internet call is intrastate because we want to exercise a State's right rationale to decide the reciprocal compensation issue now or later, we will have essentially determined right now that Internet traffic is local.

Advocacy for States' rights is not the only issue. The issue is whether when someone in California sends an E-mail to Montana there is a separate severable local segment that is subject to the CPUC regulation under the federal telecommunications law and scheme. Is there another segment in Montana subject to its jurisdiction? And is the middle regulated by the FCC? In my view, there is no need for duplicity of regulation when a single, integrated regulation of the interstate call can be done by a single regulator.

The Internet is an interstate network of computer systems interconnected with the telecommunications network, which enables the Internet to allow communication to occur across State, federal and international boundaries. No one disputes that the Internet allows people to communicate with one another. It is a medium of communication with limitless potential for international commerce, voice communication, and video communication. No one disputes that the Internet is also a source of boundless information that resides in different locations scattered around the entire globe. This is a medium far more important in its capacity and potential to bring together all humans on the globe connected with one another than any other communication medium we have experienced in this civilization. It is also undergoing dynamic evolution and transformation. Given this, I think it will defy logic to reduce and relegate the Internet or any part of it as just information service that is physically and inherently distinguishable from telephony.

The question presented to us by the Coalition's motion is whether this medium of communication that is made up of the Internet network and in part the telephone network can be broken into separate and distinct pieces, so that we can carve out a State jurisdiction. The entire exercise of determining whether Internet traffic is intrastate or interstate rests on where we believe the Internet traffic terminates at the ISP's modem or somewhere else where the caller desires. I believe it terminates at the ultimate destination of the caller. Here is why.

First, the transformation of the Internet call as it traverses from an end user to its final destination has no decisional influence as to where the call terminates. The physical transportation of the call from the end user to the ISP is accomplished by the CLEC which receives the call from the end user and sends it to the ISP on its trunks, just as it does any call to another customer. However, when the call reaches the ISP's modem, unless the desired destination resides at

the ISP, the ISP generally routes the call to its ultimate destination which may be within the state, in another state, or at an international site, using what is called “packet switched data” protocol. The ISP then keeps the connection active for transmission and reception of communication to occur. On its way, the message or data may be “packetized” before it gets to its destination; but whatever happens in between you get your message across or receive it the way it is intended.

In this manner the ISP plays an intermediary role between the end user and the destination of the call, linking the communication path between caller in one area and the ultimate termination point. The destination of the Internet user are “mixed.” They may terminate at the ISP’s server or end up in a “web site” located in Moldavia or South Africa; or in Peoria, Illinois. And there is no way of telling what portion of the destination is where. But if it were possible to do that, then we could have had ease in determining which Internet call is interstate and which ones are intrastate, just as we do for long distance telephone calls. Here we have a medium where distance between caller and called is nearly irrelevant, a condition that is not hard to imagine for ordinary telephony in the near future.

When you consider the mixed nature of calls in the Internet and long distance service, the fundamental jurisdictional similarity between the two is inescapable. The only differences between them, I see it, are technology and the type of communication used. Internet traffic is largely data and “packet switched”; whereas interexchange is voice transmission and circuit switched. But I note that this distinction may in fact be more limited than my description because today with the right gadgets you can make a voice call using the Internet.

After a serious consideration of the issues, I have taken the view that our analysis of this case must consider the whole integrated, inseparable picture just as the FCC did in a number of cases before it concerning jurisdictional issues. The

FCC's rulings in the past provide ample support to an end-to-end analysis in determining the jurisdictional nature of Internet traffic. Let me cite a few them.

First, the FCC's analysis in the Memory Call case is instructive in our consideration here. In the Memory case, the FCC relied and explicitly stated its rationale in its determination of jurisdiction that what mattered most was the ultimate termination of the call regardless of the location of the call forwarding service. It said that its jurisdiction does not end at the local switch but continues to the ultimate termination of the call.

Second, the FCC asserted jurisdiction over certain type of local calls used to provide interstate service in New York saying that the service as a whole was interstate and thus subject to its jurisdiction consistent with its analysis of call origination and its ultimate termination.

Finally, the FCC has also applied its end-to-end analysis to Bellsouth's voicemail to conclude that voicemail is jurisdictionally interstate despite the fact that the voicemail allowed out-of-state callers to retrieve their messages by using an intrastate call forwarding service. The focus of the FCC in this case was on the existence of "a continuous two-way transmission path from the caller, who is out of state, to the voicemail service" to determine that the call is an interstate communication.

Let me turn now to another extensively argued issue which the majority's decision misconstrues in reaching its conclusion. The FCC's exemption of access charges for Internet access traffic is an extension of a preferential treatment based on public policy goals to protect budding technologies from access charges just as it did for other enhanced services. If the FCC put aside its protectionist policy objectives towards the Internet and fully considered the issue further, access charge would apply to Internet traffic.

This is perhaps made clear in its Access Charge Reform Order last year, in which the FCC re-affirmed its preferential treatment of ISPs. In that order it specifically said ISPs may use incumbent LEC facilities to originate and terminate interstate calls, but that they should not be required to pay interstate access charges. ISPs would pay business line rates, and other appropriate line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries.

This exemption was granted not because of an FCC's determination that ISPs were end users or had a different use of the local exchange network but because of a policy preference that Internet traffic should be free of access charges.

Consistent with this characterization of Internet service, my alternate order resolves that the relevant determinant as to whether ISP traffic is intrastate or interstate is the nature of communication. Jurisdictional determination must consider the ultimate termination of the call. ISP calls terminate at the ultimate destination the caller intends to reach just as long distance telephone calls terminate at a remote location outside of the local calling area.

A call to the modem of an ISP is not an end by itself. It is merely a necessary stop as it continues to travel to its final destination. The ISP is a means for the completion of Internet communication that has a beginning and a termination.

The resolution of the call termination automatically leads to treating Internet calls as interstate calls and thus not subject to reciprocal compensation. The alternate decision proposes to treat Internet traffic in the manner I described to you. It will protect the integrity of the telecommunications network, prevents gaming of the reciprocal compensation system that, in my view, was not established for the purposes of one way traffic, and protects local competition by

encouraging CLEC's to compete in the local market by providing local telephone service instead of seeking an additional revenue source.

The majority's decision takes the contrary view that Internet traffic is severable for state jurisdictional purposes and in so doing perverts the definition of local calling. I disagree.

For all the above reasons I dissent from the majority decision.

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Josiah L. Neeper  
Commissioner

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